No. 559

# In the Supreme Court of the United States

October Term, 1923.

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UNITED STATES OF AMERICA, PETITIONER,

*v.*

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE GOVERNMENT'S APPEAL.

# INDEX.


| | Page |
|---|---|
| Parties to this brief | 1 |
| Statement | 4 |
| Outline of argument | 5 |
| I. The purpose of the Food and Drugs Act | 7 |
| II. The Act should be liberally construed to give effect to that purpose | 9 |
| III. What meaning should be given to the language of the Act | 10 |
| IV. Of what judicial notice should be taken | 13 |
| V. The application of these principles to the case at bar | 17 |
| 1. The meaning of the words "cider vinegar" | 17 |
| 2. Cider vinegar is a distinctive name | 18 |
| 3. Why claimant removes the sulphur dioxide with barium carbonate although other manufacturers of such vinegar do not | 21 |
| 4. The analogies referred to in the court below | 22 |
| 5. The suggestion that a truthful label would be prejudicial to claimant | 25 |
| 6. The argument of the court below that no substantial or harmful deception is practiced on the consumer | 29 |
| VI. The deductions of the court below believed to be erroneous | 32 |
| 1. That claimant is engaged in the manufacture of apple cider and apple cider vinegar from dried apples | 32 |
| 2. That the liquid from which this vinegar was made was manufactured from apples and from nothing else | 32 |
| 3. That the government practically conceded that this liquid was apple cider | 35 |
| 4. That this liquid was obtained by pressure | 36 |
| 5. That this identical product has been accepted by the trade under this name | 38 |
| 6. That these products are identical in taste, substance and chemical test with apple cider pressed from unevaporated apples or apple cider vinegar made therefrom | 39 |
| 7. That the added water was substantially equivalent to what had been evaporated from the fresh apples | 40 |
| VII. The assumptions of the court below dehors the agreed statement, believed to be erroneous | 41 |
| 1. That sun-dried apples contain less moisture than the dried apples used by claimant | 41 |
| 2. That the fresh apple season is too short for economical utilization of the apple crop | 42 |

Page

3. That vinegar made from concentrated cider with added water could legally be called cider vinegar ..... 44
4. That decayed apples are used in the manufacture of genuine cider vinegar as stated in the Standard Encyclopedia 45
5. That water in large proportions is added to apple pomace in the production of genuine cider vinegar ..... 46
6. That claimant's product has been unchallenged for many years ..... 46
7. That the Act only provides against deception "to the prejudice or harm" of the purchaser ..... 47

VIII. Important parts of the agreed statement to which the court below failed to give due weight ..... 48
1. The vinegar in question is a by-product in the manufacture of pectin by claimant ..... 48
2. Analogous applications of the decision of the court below 50
3. Ohio and other state statutes ..... 51

IX. Importance of the question involved not clearly apparent from the agreed statement ..... 53

X. The decision in favor of claimant in the New York Court of Appeals ..... 55

XI. Conclusion ..... 57

## CASES CITED.

Andersen v. U. S., 284 Fed. 542..... 10
Armour & Co. v. Dairy & Food Com., 159 Mich. 10..... 11
Brown v. Piper, 91 U. S. 37 ..... 13
Cal. Fig Syrup Co. v. Stearns, 73 Fed. 812..... 12
Comm. v. Boston White Cross Milk Co., 209 Mass. 30..... 23
Comm. v. Burtnett, 58 Pa. Sup'r. Ct., 604..... 9, 53
Corpus Juris, Vol 11, p. 764 ..... 15
Dade v. U. S., 40 App. Cas. (D. C.) 94..... 9
Duffy-Mott Co. v. Blair, 292 Fed. 986 ..... 14
Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570..... 13, 15
Federal Trade Com'r. v. Winsted Hosiery Co., 258 U. S. 483..... 12
Galt v. U. S., 39 App. Cas. (D. C.) 470..... 9
Hebe Co. v. Shaw, 248 U. S., 297..... 10
Hildick Apple Juice Co. v. Williams, 269 Fed. 184..... 14
King v. Gallun, 109 U. S. 99..... 13
Libby, McNeill & Libby v. U. S., 210 Fed. 148..... 8, 10, 11
MacDermott v. Wisconsin, 228 U. S. 114..... 9
Maddock v. Magone, 152 U. S. 368..... 13
Monroe Cider Vinegar & Fruit Co. v. Riordan, 280 Fed. 624..... 14
Nix v. Hedden, 149 U. S. 304..... 14
Pearks v. Knight, 70 L. J. K. B. N. S., 1002, L. R. A. 1915 B 776, n ..... 23

Page

People v. Arensberg, 105 N. Y. 123 ..... 23
People v. Douglas Packing Co., 236 N. Y. 1 ..... 55
People v. Girard, 145 N. Y. 105 ..... 47
People v. Henning, 260 Ill. 554, 103 N. E. 530 ..... 8
People v. Koster, 121 N. Y. App. Div. 852 ..... 22
People v. Kuperschmid, 107 Misc. (N. Y.) 506 ..... 23
People v. Niagara Fruit Co., 173 N. Y. 629 ..... 56
Pillsbury v. Pillsbury-Washburn Flour Mills, 64 Fed. 841 .... 12, 27
Plumley v. Mass., 155 U. S. 462 ..... 8, 9
Royal Bak. Powder Co. v. Donahoe, 265 Fed. 406 ..... 11
Royal Bak. Powder Co. v. Emerson, 270 Fed. 429 ..... 11, 27
Smith v. Rheinstrom, 65 Fed. 984 ..... 24, 28
State v. Crawley, 75 Miss. 919 ..... 15
State v. Oliver, 26 W. Va. 422 ..... 15
State v. Spalding, 61 Vt. 505 ..... 15
State v. Frederickson, 101 Me. 37 ..... 15
Sterling Cider Co. v. Casey, 285 Fed. 885 ..... 14
U. S. v. Anti Kamnia Chem. Co., 231 U. S. 654 ..... 8
U. S. v. Bhagat Singh Thind, 261 U. S. 204 ..... 10
U. S. v. 40 Barrels, 241 U. S. 265 ..... 18, 19
U. S. v. Isham, 17 Wall 496 ..... 10
U. S. v. Lexington Mill Co., 232 U. S. 399 ..... 8, 30
U. S. v. Schider, 246 U. S. 519 ..... 8
U. S. v. Seventy-five boxes alleged pepper, 198 Fed. 934 ..... 10
U. S. v. 10 Barrels of Vinegar, 186 Fed. 399 ..... 28
U. S. v. 2 cases Chloro Naptholeum Dis., 217 Fed. 477 ..... 26
Von Bremen v. U. S., 192 Fed. 904 ..... 12
Weeks v. U. S., 245 U. S. 618 ..... 9
Worden v. California Fig Syrup Co., 187 U. S. 516 ..... 12

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DOUGLAS PACKING COMPANY,
*Claimant.*

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## BRIEF OF AMICUS CURIAE IN SUPPORT OF THE GOVERNMENT'S APPEAL.

By permission of this court and with due acknowledgement of the courtesy, this brief is filed in support of this appeal, on behalf of

1. The American Cider and Vinegar Manufacturers Association, a national trade organization whose members are engaged in the production of genuine cider and genuine cider vinegar from the pure native juice of fresh, whole apples. Its membership includes many of the largest manufacturers of such products in the coun-

try, and its executive office is purposely located at Rochester, New York, in the heart of one of the great apple producing districts of the country.

2. The National Grange, a national organization of farmers representing growers of apples, which presents the following resolution:

> Whereas, the farmer producers of food products in the United States are continually finding themselves injured by the competition of artificial and imitation products, and
>
> Whereas, the farmers were among the first advocates of the Pure Food Law and are now its strongest supporters, and
>
> Whereas, we believe that the intent of the Pure Food Law to protect both producers and consumers from frauds and imitations, is being violated by misleading labels which technical interpretation of its provisions permits being used, and
>
> Whereas, a striking illustration of this is found in a recent decision in a Federal Circuit Court, which permits manufacturers of a kind of vinegar made from dried apples to be labeled with the words "Pure Cider Vinegar," which decision is very detrimental to the manufacture of real cider vinegar and the business of apple growers and producers in furnishing apples for its manufacture, and
>
> Whereas, this decision is also opposed to the views of the officials of the Bureau of Chemistry, United States Department of Agriculture, who have charge of enforcing the Pure Food Law, and is now being contested in the United States Supreme Court by the Attorney-General and the Solicitor of the U. S. Department of Agriculture, now therefore,

> Be it Resolved, that we go on record as favoring the prosecution of this appeal to the end that the words "Pure Cider Vinegar" be limited in their use to vinegar made from the expressed native juice of whole fresh apples, and that we hereby authorize William W. Armstrong of Rochester, N. Y., to present this statement of our views and urge the Supreme Court to give proper consideration to the same.

3. The American Farm Bureau Federation, another national organization of farmers, representing growers of apples.

4. The H. J. Heinz Company of Pittsburgh, Pa., one of the largest producers of genuine cider vinegar in the country.

5. The National Fruit Product Company of Washington, D. C., and I. S. Dawes & Son of Imlaystown, N. J., large manufacturers of both genuine cider vinegar and vinegar made from dried apples who distinguish these products by appropriate labels, samples of which will be submitted with this brief, and who market their vinegar made from dried apples *without attempting to remove the sulphur dioxide.*

These producers of apples and manufacturers of genuine cider and genuine cider vinegar join in this appeal for the reason that the continuance of the large industries in which they are engaged, has been imperiled by the decision of the court below without opportunity to be heard although the interests represented by them and thus affected by the decision, are many times greater than that of claimant.

## STATEMENT.

The packages in question were labeled, so far as pertinent here

"Apple Cider Vinegar"
"Made from Selected Apples"
"Guaranteed to Comply with all Pure Food Laws"

The article in the packages was a vinegar made from a liquid obtained by adding water to dried apples. The District Court eliminated the two charges of adulteration, one by finding the charge unsupported and the other by making no finding thereon.

The question before the court was, in the language of the statute, (1) whether the package or label bore any statement regarding such article or the ingredients or substances contained therein which were false or misleading in any particular, (2) whether the article was an imitation of or offered for sale under the distinctive name of another article, or (3) whether it was labeled so as to deceive or mislead the purchaser.

The question, as stated by the court below, in its opinion, was, "whether the product is the identical thing that its brand indicates" (Opinion p. 31).

Claimant demurred, before answer, in the District Court, and, apparently by reason of the court's suggestion in overruling the demurrer (R. p. 10), the cause was submitted to the District Court upon an agreed statement of facts without taking testimony. The District Court rendered judgment for the Government condemning the vinegar as misbranded; that judgment was re-

versed by the Circuit Court of Appeals in the Sixth Circuit whereupon the Government brought the case to this court upon writ of certiorari.

A majority of the court below was of opinion that the judgment of the District Court was not sustained by the agreed statement of facts because this product was made from the juice of apples and was substantially identical with apple cider vinegar made from fresh apples. It does not appear who of the judges dissented.

## ARGUMENT.

We shall discuss these questions under the following subdivisions:

I. The purpose of the Food and Drugs Act.
II. The Act should be liberally construed to give effect to that purpose.
III. What meaning should be given to the language of the Act.
IV. Of what judicial notice should be taken.
V. The application of these principles to the case at bar.
    1. The meaning of the words "cider vinegar."
    2. Cider vinegar is a distinctive name.
    3. Why claimant removes the sulphur dioxide with barium carbonate although other manufacturers of such vinegar do not.
    4. The analogies referred to in the court below.
    5. The suggestion that a truthful label would be prejudicial to claimant.
    6. The argument of the court below that no substantial or harmful deception is practiced on the consumer.

should be construed to give substantial effect to the intention to protect the consumer and meet the evils intended to be embraced within its provisions.

*Libby, McNeil & Libby vs. U. S.*, 210 Fed. 148.

> Every consumer has the right to distinguish for himself what an article of food is and have the means of judging for himself, uninfluenced by deception, its quality and value.
>
> *People vs. Henning Co.*, 260 Ill., 554, 103 N. E., 530, 9 L. R. A. N. S. 1206.

In the above case in Illinois, the court condemned a vinegar *although apparently correctly labelled,* for the particular reason that it was an imitation of cider vinegar which *might* deceive and mislead the public.

> The purpose of the Act is to secure the purity of foods and drugs and *to inform purchasers of what they are buying.* Its provisions are directed to that purpose and must be construed to effect it
>
> *U. S. vs. Anti Kamnia Chemical Co.*, 231 U. S. 654, 665.
>
> *U. S. vs. Schider,* 246 U. S. 519, 522.

> The legislation as against misbranding intended to make it possible that the consumer should know that an article purchased was what it purported to be.
>
> *U. S. vs. Lexington Mill Co.*, 232 U. S. 399, 409-410.

The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food.

*Plumley vs. Mass.*, 155 U S., 462, 468.

The deception against which such statutes are aimed is an offense against society.

*Plumley vs. Mass.*, 155 U. S. 462, 469.

It is in the light of the purpose and of the power exercised by its passage by Congress that this act must be considered and construed.

*MacDermott vs. Wisconsin*, 228 U. S. 114, 128.

The statute is so particular in this respect that it is not limited to actually misbranded goods but extends to those offered for sale in imitation of or under the distinctive name of another article, although the package itself may be correctly branded.

*Weeks vs. U. S.* 245 U. S. 618.

## II.

### The Act Should Be Liberally Construed to Give Effect to That Purpose.

Food acts must be liberally construed so as to give substantial effect wherever possible to the legislative intent to protect the consumer and to meet the evils intended to be embraced within their provisions.

*Galt vs. U. S.* 39 App. Cas. (D. C.), 470.

*Dade vs. U. S.* 40 App. Cas. (D. C.), 94.

The rule of strict construction is not violated by giving the words in this statute a reasonable meaning according to the sense in which they were used.

*Commonwealth vs. Burtnett*, 58 Pa. Sup'r. Ct., 604.

"The rule of strict construction has little or no application to food statutes."

*Andersen vs. U. S.*, 284 Fed., 542.

"If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or we may add, by the personal opinion of judges 'upon the issue which the legislature has decided.'"

*Hebe Co. vs. Shaw*, 248 U. S. 297, 303.

## III.

## What Meaning Should Be Given to the Language of the Act.

The language of the statute must be construed in accordance with the understanding of the common man from whose vocabulary it was taken.

*U. S. vs. Bhagat Singh Thind*, 261 U. S. 204.

The words of a statute are to be taken in the sense in which they will be understood by the public, in which they are to take effect. Science and skill are not required in their interpretation except where scientific or technical terms are used.

*U. S. vs. Isham*, 17 Wall., 496, 504.

*U. S. vs. 75 Boxes of alleged pepper*, 198 Fed. 934, 935.

*Libby, McNeil & Libby vs. U. S.*, 210 Fed. 148.

The inquiry in such cases is whether the ultimate purchaser will be misled.

*Libby, McNeil & Libby vs. U. S.* 210 Fed. 148, 150.

*Royal Baking Powder vs. Emerson*, 270 Fed. 429, 435.

*Royal Baking Powder vs. Donohue*, 265 Fed. 406, 408.

Courts will take cognizance of the well known fact that farmers, laboring men and consumers are not generally familiar with the customs of trade and commerce in importing goods or of the understanding of the trade between manufacturers and merchants who buy these food products for retail trade. Such construction would emasculate the pure food laws and deprive the people of the protection which the legislature wisely intended to give them.

*Libby, McNeil & Libby vs. U. S.*, 210 Fed. 148, 150, citing

*Armour & Co. vs. Dairy & Food Commission*, 159 Mich. 10.

The argument for claimant is that because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believes that fig juice or syrup has laxative medicinal properties. It is to them that claimant seeks to sell its preparations and it is with respect to their knowledge and impression that the

character, whether descriptive or fanciful, of the term used is to be determined.

*Worden vs. Cal. Fig Syrup Co.*, 187 U. S. 516, 536, citing

*Cal. Fig Syrup Co. vs. Stearns*, 73 Fed. 812 (Taft Cir. J.)

In support of the reversal of the District Court's judgment, the case of Von Bremen vs. U. S., 192 Fed. 904, is cited by the court below. The reasoning of that case, however, is not applicable to the instant case. Claimant's real contention here is not that the words "apple cider vinegar" have acquired a secondary meaning in the mind of the purchasing public as did the words "salad oil" in the Von Bremen case; but that the words here involved in their primary and popular signification, are truly descriptive of its vinegar.

The opinion in the court below appears to hold that the practice of certain vinegar manufacturers (without disclosure to the ultimate purchasing public) of labeling dried apple vinegar as "apple cider vinegar" would suffice to bring about a modification of the meaning of that term. Such a practice, however, on the part of food manufacturers would not be sufficient to validate a falsely descriptive term and render it true.

*Worden v. California Fig Syrup Co.*, 187 U. S. 516, 528.

*Pillsbury v. Pillsbury-Washburn Flour Mills*, 64 Fed. 841.

*Federal Trade Comm. vs. Winsted Hosiery Co.*, 258 U. S. 483, 492.

See also the statement from the opinion of this court in the case of Maddock v. Magone, 152 U. S. 368, as to the elements necessary to establish a commercial designation for a term, where at page 371 the following occurs:

> "Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal."

## IV.

### Of What Judicial Notice Should Be Taken.

The District Court committed no error in taking judicial notice of the meaning of such common words as cider, cider vinegar and apples, especially in view of the concession in the agreed statement (R. p. 12) that vinegar made from the juice of fresh apples is entitled to the name "apple cider vinegar".

> "Courts will take notice of the meaning of words in the English language and of such matters of common knowledge and science as are or may be well known to all men of ordinary understanding and intelligence."
>
> *Brown v. Piper*, 91 U. S., 37, 42.
>
> *King vs. Gallun*, 109 U. S., 99, 102.
>
> *Eureka Vinegar Co. vs. Gazette Printing Co.*, 35 Fed., 570, 571.

> "The court is bound to take judicial notice of the ordinary meaning of all words in our own

tongue. Dictionaries are admitted not as evidence but as aids to the memory and understanding of the court."

*Nix vs. Hedden*, 149 U. S., 304.

So the federal courts have repeatedly taken judicial notice of the meaning of the word cider.

*Monroe Cider, Vinegar & Fruit Co. vs. Riordan*, 280 Fed., 624.

*Sterling Cider Co. vs. Casey*, 285 Fed. 885, affirmed by the First Circuit Dec. 21, 1923.

*Hildick vs. Williams*, 269 Fed., 184.

*Duffy-Mott Co. vs. Blair*, 292 Fed. 986.

In the Monroe Cider, Vinegar & Fruit Company case (supra), the court said:

"It (cider) has a familiar place in literature; for Bacon refers to 'a kind of cider made of a fruit of that country,' and in Audley Court, Tennyson speaks of 'a flask of cider from his father's vats.' An English revenue or excise statute of 1763 was known as the cider act.

Sweet and hard cider have been designations of the fermented and unfermented expressed juice of apples in common use in the English language long before any man now living was born.

Doubtless in every state of the Union, and almost in every corner of every state, sweet cider is produced for home consumption or commercial distribution, and whether in the Genesee Valley or the Shenandoah Valley there is hardly a farm, large or small, where, typical of the farms throughout the country, there is not some production of sweet cider."

There is no authoritative definition of apple cider which embraces the artificially produced solution obtained from dried apples and water. Whenever the term "cider" has been judicially noticed it has been applied exclusively to the expressed native juice of fresh apples, thus in Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570, 571, it was held that:

> The meaning of the word "cider," its method of production, and its general constituents, are matters of common knowledge, and upon which all books of accepted authority agree. *No court would be justified in affecting ignorance of these facts, or in closing its eyes to them, in cases requiring their application.* In a popular sense, the term "cider" includes the expressed juice of apples, either fermented or unfermented, and hence the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation.

See also *State vs. Frederickson*, 101 Me. 37.
*State vs. Spaulding*, 61 Vt. 505.
*State vs. Crawley*, 75 Miss. 919.
*State vs. Oliver*, 26 W. Va. 422.
11 *Corp. Juris* 764.

The foregoing excerpts from adjudicated cases leave no doubt that the product popularly known as apple cider consists exclusively of the native juice expressed from fresh apples, and that such fact is properly the subject of judicial notice. Current standard lexicographies which reflect current usage continue to define the word "cider" without modification of its original meaning.

The court below indicated that its decision was based upon lack of judicial knowledge that the word "cider" in the English language imported the expressed juice of fresh apples by twice declaring that to be one of its reasons as follows:

> "The missing and essential element for the government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below and the judgment based thereon" (Opinion p. 33).
>
> "The opinion (in the District Court) seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded." (Opinion p. 36).

The basis of the reversal of the District Court's judgment appears to be that the definition of apple cider vinegar judicially noticed and applied by the court below, included a process of production which was no essential part of the definition. This conclusion is untenable where the label on claimant's product implied a particular process or method of production from a source and material which left the ultimate purchaser under the *unescapable* impression that the product was other than what it was, namely, apple cider vinegar produced in the well known way from the expressed juice of fresh apples.

## V.

### The Application of These Principles to the Case at Bar.

#### 1. The meaning of the words "cider vinegar."

Vinegar is a generic term and comprises many different kinds as cider vinegar, distilled vinegar, sugar vinegar, wine vinegar etc. The words "apple cider vinegar" necessarily import that it is made not only from apples but from cider. In addition to this the agreed statement (R. p. 12) concedes that vinegar made from the juice of unevaporated apples is entitled to the name "apple cider vinegar".

"Apples" in the ordinary, popular understanding have never included other than fresh apples. Any other kind of apples has required an adjective of distinction, such as dried evaporated, canned, etc. A contract for the purchase of apples could not be fulfilled by the tender of dried apples or rotten apples or other than by the tender of merchantable, fresh apples.

And the word "cider" for many centuries in the English language, and for many centuries before that in the languages from which English was derived, has meant both in the ordinary popular understanding, and according to lexicographers and etymologically, the native juice of fresh apples or fresh fruit. Lexicographers unite in declaring juice to mean "the expressible or extractive fluid of the plant or fruit."

"Cider vinegar" obviously means vinegar made from cider. The addition of the word "apple" adds nothing to the meaning, for there is no other kind of cider than

apple cider. Now while apple vinegar may not always import a vinegar made from cider, cider vinegar not only imports a vinegar made from apples but a vinegar made also from cider, and that in turn necessarily imports the native juice of fresh apples.

Labels are to inform the public. They are for their benefit, and the law must be construed so as to enable the public to determine from the labels what it prefers without deception *in any particular.*

And so it comes about that many technical terms which otherwise would be unobjectionable are positively objectionable under this statute because they are not understood by the public, they being the persons for whose protection the statute was passed and for whose protection its language must be enforced. The reason for this is very plain. The consumer may not understand scientific terminology, but he is familiar with the ordinary meaning of words, and he will not be deceived or misled by their use, although their popular meaning may not be scientifically accurate; for example, soda water is a familiar trade description of an article which now as is well known, rarely contains soda in any form. Such a name is not to be deemed either misleading or false as it is in fact distinctive.

*U. S. vs. 40 Barrels,* 241 U. S. 265, 287.

**2. Cider vinegar is a distinctive name.**

In this country the word vinegar standing alone, which originally meant sour wine, has been used for generations to designate a product made from apples and has not been used to designate vinegar made from any other source without an adjective to indicate the distinc-

tion, such as distilled vinegar, sugar vinegar, wine vinegar, etc., and similarly cider vinegar has been used to designate an article made exclusively from cider, which in turn has never been understood to mean anything else than the native juice of fresh apples, so that when any other kind of vinegar is offered for sale under the name of cider vinegar it is an imitation or offered for sale under the distinctive name of another article, in violation of the terms of the statute, and also in violation of the statute which provides that the label shall bear no statement which shall be false or misleading in any particular. It would be difficult to find language more precise or comprehensive.

In discussing what a distinctive name may be this court has said:

> "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public it matters not that the name had originally a different significance. * * * Such a name is not to be deemed either misleading or false, as it is in fact distinctive. But unless the name is truly distinctive the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article'; thus that which is not coffee or is an imitation of coffee cannot be sold as coffee and it would not be protected by being called 'X's Coffee.' "
>
> *U. S. vs. 40 Barrels*, 241 U. S., 265, 287.

Cider vinegar is thus a name "by which a product of a given kind is distinctively known to the public."

Let it be plainly understood that we have no quarrel with this product when sold under its own label for what it is. Our only quarrel with it is when it is sold under a label for what it is not, nor are we concerned with how closely it approximates the article which it imitates; the greater the similarity the greater the opportunity for deception; the closer the similarity between the genuine and the imitation product the greater the vigilance of the court should be to enable an informed public to intelligently discriminate as to which it prefers. If we could make a counterfeit ten dollar bill so nearly like a genuine one that the difference could not be detected by treasury experts, we would be the most dangerous counterfeiters in the country; the fact that it is not the other article under whose label it is sold at once disposes of all argument that it is entitled to be called that article. In the language of the Act it is an imitation or offered for sale under the distinctive name of another article and so is misbranded.

The suffix "ade" in our language means water flavored either with an extract or the juice of fruits, such as, "lemonade", "orangeade", etc., and in this sense the word "appleade" more nearly describes the solution claimant obtains from dried apples than the term "cider" which it uses. If it would use some such terminology for its product it would not be necessary to distort the popular and quite precise meaning of the terms cider and apple juice.

### 3. Why claimant removes the sulphur dioxide with Barium Carbonate although other manufacturers of such vinegar do not.

The quantity of sulphur dioxide, as stated, in dried apples, is "small and entirely harmless." (R. p. 11). If claimant chose to leave this small and entirely harmless quantity of sulphur dioxide in the liquid it would in no manner impair its quality any more than the sulphur dioxide in ordinary commercial dried apples impairs the quality of pies or sauces made therefrom, but if claimant left this sulphur dioxide in the liquid its presence in the finished product would unmistakably characterize the nature of that product, and the removal of this sulphur dioxide by the use of the barium carbonate is for the sole purpose of removing therefrom *the only definite earmark of its character* and *to imitate* the more expensive and genuine article, cider vinegar.

Other manufacturers of vinegar from dried apples, among whom are National Fruit Product Company and I. S. Dawes and Son whom we represent, have not so removed this sulphur dioxide and have sold the product as vinegar made from evaporated apples, obtaining, it is true, a less price therefor, but honestly branding it for what it was (See their labels).

Barium carbonate which claimant uses to precipitate the sulphur (R. p. 11) is a virulent poison. When the quantity of barium carbonate used for this purpose is just sufficient for the purpose only a trace of barium remains in the finished vinegar. *But suppose some careless employee used too much:* then the finished vinegar would be poisonous. And the Act forbids the interstate shipment of articles of food if they "contain any added poisonous or other added deleterious ingredient which *may* render such articles injurious to health."

**4. The analogies referred to in the court below.**

The first of these was cream obtained by the use of a separator.

It is of course immaterial whether an article sold as cream was cream which rose to the top of the milk or was obtained by a centrifugal separator. The cream thus produced was the native butter fat contained in the milk. Similarly it would not matter whether the cider from which the vinegar was made was derived by the ordinary means of pressure or by a centrifugal separator if that method could be applied to it. The native juice thus obtained from the apple by either method would be cider, and the term cider has never included anything else than the native juice of the apple.

If the same quantity of water which had been evaporated from evaporated milk were restored, would the product thus produced be entitled to be labeled and sold as milk, which has always meant the natural, lacteal fluid and nothing else, even if the constituents thereof were chemically or by every other ascertainable method, identical?

This very principle has been applied to milk from which a portion of the cream had been removed, although what remained *contained the required percentages of fats and solids.*

*People vs. Koster*, 121 N. Y. App. Div., 852.

The same principle has been applied to oleomargarine when sold as butter, although the court assumed that oleomargarine *was composed of the same elements and was substantially the same article as butter* except as regards its origin.

The court said:

> "If it possesses the merits which are claimed for it and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is and upon its own merits and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter but it is not butter made from cream and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

*People vs. Arensberg*, 105 N. Y., 123, 129.

And it cannot be doubted that the court would apply the same reasoning to butter made from evaporated whole milk, or evaporated cream. Indeed, the principle has already been applied to a product made from powdered milk.

*Commonwealth vs. Boston White Cross Mill Co.*, 209 Mass., 30.

And to the sale of malted milk when the proofs showed it was made from powdered, skimmed milk.

*People vs. Kuperschmid*, 107 Misc. (N. Y.), 506.

Milk constituents are normal ingredients of butter, but butter to which milk had been added so that it contained at least six per cent more water than normal butter has also been condemned.

*Pearks vs. Knight*, 70 L. J. K. B. N. S. 1002, 85 L. T. N. S. 379, L. R. A., 1915B, 776, note.

It may be suggested that the principle of the oleomargarine case is not applicable because oleomargarine contains ingredients not derived from milk or cream, but claimant's product contains ingredients not derived from the apple, and more important still, claimant is obliged to resort to artificial means (removal of the sulphur dioxide used in drying), as was the oleomargarine maker, to make it resemble cider vinegar, a more expensive article, in order to obtain the higher market price of cider vinegar, as plainly appears from the agreed statement of facts.

The other analogy of the court below relative to the manufacture of maple sirup from maple concrete dissolved in water is less apt, as the court recognized, and the ruling itself is fundamentally erroneous. The fact is that sirup is an equivocal term and merely indicates a concentrated product. The analogy fails because the terms "juice" and "sirup" are not comparable terms. The word "sirup" is a generic term for any concentrated or viscous liquid made from the crystals of cane or beet sugar or other sources. In its application to maple sirup it means the sap of the maple tree condensed by boiling to the requisite consistency or (as permitted by the ruling) by adding water to the maple concrete, but the term "syrup" is not interchangeable with the terms "sap" or "juice".

This distinction is plainly pointed out in a decision by Mr. Justice Taft when a judge in the Sixth Circuit in the case of Smith v. Rheinstrom, 65 Fed. 984, 986, elsewhere referred to in this brief.

A truer analogy would exist in the products of the maple and the apple tree by using the terms "sap" and "juice" as substantially equivalent terms.

Manufacturers and dealers in maple sirup have been obliged to meet this ruling by distinguishing between genuine maple sirup produced by boiling maple sap and that produced by disolving maple concrete in water by branding the former "maple sap sirup" and thus enabling an informed public to discriminate between the two products.

**5. The suggestion that a truthful label would be prejudicial to claimant.**

The argument is that a label which disclosed the source of the vinegar in question would be prejudicial because the consumer might be prejudiced if he knew its origin and that the consumer must be kept in ignorance of this so that he may not have an opportunity to exercise his intelligence. Where can support be found for such a proposition in this statute whose express purpose is to prevent the consumer from being misled or deceived *in ony particular?* Because the reduction of vinegar with water is permitted when indicated upon the label it is argued that the use of water in the manufacture of the vinegar is not open to criticism, but the government ruling permitting the reduction of vinegar with water presupposes that cider vinegar shall first have been produced before the reduction is attempted, and unless the substance reduced be first genuine cider vinegar it is a violation of the statute.

The statement in the opinion of the court below (R. p. 34) that "a large part of the purchasing public * * * might have a distinct prejudice against such a method of manufacture" as that employed by claimant finds support in the motion filed by claimant in the court below to advance the cause (R. p. 27) where claimant urged as

its reason therefor that until the controversy resultant from the decision in the District Court was settled, claimant was "very seriously handicapped in the manufacture and distribution of its product". It is precisely that handicap that claimant seeks to avoid in this litigation by marketing its product under the long used and well understood label of cider vinegar instead of revealing the truth to the consumer.

The statement in the court below that it would be an undue hardship to compel claimant to label its vinegar so as to disclose its derivation from dried apples and added water is also pertinently answered by the following observations of Judge Rose in the case of U. S. v. Two Cases of Chloro Naptholeum Disinfectant, 217 Fed. 477, at page 484 of the opinion.

> Claimant pointed out that for many years it had sold large quantities of its product under this particular name. It had done no harm to anybody. It asked why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so would be both costly and inconvenient. Nevertheless, it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. He cannot afford to say anything about his goods which is not true in every reasonable sense, and from the standpoint of every well-informed person, true. If he is a law-abiding man, he does not want to take the chance of doing something which may be held to be illegal.

In Royal Baking Powder Company v. Emerson, 270 Fed. 429, it was held:

> If the manufacturer of a product or article of established reputation makes a change in the article, and that change be of a character which would, considering all the attendant circumstances, naturally affect the attitude of the purchaser of that article, fair dealing and the law requires that such purchasers be effectively informed of that change.

In the case just cited, an analogous situation is presented to that of the instant case. Baking powder is merely a combination of some inert material acting as a vehicle with a leavening agent. Ordinarily, the leavening agent is either phosphate or cream of tartar. The misbranding in that case was predicated upon the substitution of phosphate for cream of tartar in the product without informing the public of such substitution by an appropriate change in the labeling of the product.

It is a vital principle of labeling statutes derived from equity that *purchasers may not be led by deception into buying an article they do not want*, even where such buying would result in their advantage.

> *Pillsbury vs. Pillsbury-Washburn Flour Mills*, 64 Fed. 841.

As Judge Westenhaver said, "the mere fact that 'apple cider' and 'selected apples' are brought together in this label conveys unmistakably the impression" (that the vinegar is made from the native juice of fresh apples).

And the phrase on the label, "Guaranteed to Comply with all Pure Food Laws" adds emphasis to the misrepresentation contained in the label. As was said in *U. S. v. 10 Barrels of Vinegar*, 186 Fed., 399, 401, in referring to any latent suspicion which might be aroused in a purchaser by such a label:

> "He, (the purchaser) is comforted with the assurance 'We guarantee the vinegar sold under our brand to comply with the requirements of the national and state pure food laws.'"

With due deference to the opinion of the Court below, there is no justification for the assumption in its opinion that the words "apple cider", in common English speech and usage, means any other product than the native juice of fresh apples. Even if the extreme concession be made that claimant is correct in the debatable assumption, that the residual moisture remaining in the dried chopped apples from which this vinegar was made, is in such form as to be correctly termed "juice" or "concentrated juice", it does not follow that when such a semi-solid substance is diluted by the addition of water it is thereby reconverted into apple juice unless the term "juice" which denotes exclusively the natural fluid content of fruits, be distorted from its normal meaning.

Chief Justice Taft in the case of Smith v. Rheinstrom, 65 Fed. 984, 986, in an opinion concurred in by the late Judge Lurton, aptly disposed of a contention very similar to the one in the instant case, as follows:

> The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different

thing from the sap. Thus, the sap of the sugar maple is different from the molasses which is obtained from the sap by boiling, and no one would think of including under the term "sap," if used in the tariff act, the molasses made therefrom. It is true that, for want of a better name, this (referring to the alleged cherry juice there in question) is called "concentrated cherry juice."

**6. The argument of the court below that no substantial or harmful deception is practiced on the consumer.**

The question reduced to its simplest form is, if the public knew that it was getting a product made from dried apples instead of fresh apples, would it indicate a preference for one or the other product, and has it a right to this information in order to enable it to exercise an intelligent judgment? If it has, it is plainly entitled to the information, and if so, this product should be so branded that the public will not be deceived or misled in expressing its preference. This is not to say that its quality is inferior; but suppose a customer desires cider vinegar made from the native juice of fresh apples, how is he to be assured that he can get it if there be nothing upon the label to distinguish the one article from the other, or how is a purchaser who prefers vinegar made from dried apples to get that article? Some designing retailer may impose genuine cider vinegar upon such a consumer because it may be impossible to distinguish between them analytically except for the trace of barium. Is the customer therefore to be denied this information? And is not the presence of the trace of barium, whether injurious or not, sufficient to require a distinction between these articles?

The Lexington Mills case only held that the flour was not adulterated by the presence of a trace of nitrates. *No charge of misbranding was involved in that case.*

The holding of the court below in effect that there is no substantial or harmful deception resulting from claimant's form of labelling its vinegar, ignores the factor of unfair competition with manufacturers of genuine apple cider vinegar, the prevention of which is within the scope and purpose of the Federal Food and Drugs Act. This legislative intention may be gathered from the report of the Congressional Committee in charge of the passage of the bill in the House of Representatives, wherein it is observed that

> "In the competition of modern business life it becomes necessary to give some protection to the legitimate manufacturer and dealer as against his dishonest and unscrupulous rival who unfairly competes with imitations and spurious articles of poor quality. (House Report No. 2118 59th Congress, 1st Session accompanying Senate Bill No. 88).

While it was the primary intent of Congress in the misbranding provisions of this statute, to prevent deception of the ultimate purchaser, yet these provisions also protect incidentally honest manufacturers against unfair competition. Laxity, therefore, in indulging the practice of equivocal labelling on the part of manufacturers ought to be condemned by the Court even if there be no substantial interest of the consumer involved in a particular case of this character. While it may be that the interest of the consumer is not substantially involved in every case of misbranding, misbranding is not therefore to be permitted under the terms of the law, since if

the honest manufacturer be not protected from unfair competitors who indulge in misbranding to gain an unfair advantage in the trade, the consumer will ultimately suffer from the discouragement to honest dealers thus brought about.

A cardinal principle, therefore, in the enforcement of labelling laws such as the Food and Drug Act requires that ambiguous or equivocal wordings upon a label *be resolved in favor of the consumer and against the manufacturer* who is the author of such label since otherwise the objects of the law will be frustrated.

In the present case the manufacturers of apple cider vinegar from the natural juice of fresh apples will be faced with a ruinous competition if the decision of this court shall stand. It may readily be deduced from the stipulated facts that claimant is placed by this decision in a highly advantageous position over its competitors who produce apple cider vinegar entirely from fresh apple juice, since the use of dried apples by claimant is primarily for the purpose of obtaining the article known as "pectin"—*the vinegar produced being a by-product.* This being the case claimant can undersell producers of the product from fresh apples by a considerable margin; and it is a fair argument that its unwillingness to distinguish its product from that of manufacturers of genuine apple cider vinegar is founded upon a desire to dominate the vinegar market and to obtain for its product all the advantages of the cider vinegar market without the corresponding obligation of delivering genuine apple cider vinegar for the price obtained in said market.

To lend the prestige of this court's decision to the sophistry upon which claimant's case rests, will estab-

lish a precedent which will be used detrimentally to the strict enforcement of the misbranding provisions of the Food and Drugs Act in *all cases where a food product is produced from dried fruit.*

It is respectfully submitted that no hardship will be imposed upon the claimant if it be compelled to label its product by some such truthful statement as vinegar made from evaporated apples and due to the alleged superior quality of the article, to create for it a popular good-will founded upon fair, honest and unequivocal dealing with the purchasing public.

## VI.

## The Deductions of the Court Below Believed to Be Erroneous.

### 1. That claimant is engaged in the manufacture of apple cider and apple cider vinegar from dried apples.

It does not appear that claimant is engaged in the manufacture of apple cider and apple cider vinegar from dried apples which is the question here (Opinion p. 30). It does appear that claimant is engaged in the manufacture of a product from dried apples which *it designates* as "apple cider" and "apple cider vinegar" (R. p. 11).

### 2. That the liquid from which this vinegar was made was manufactured from apples and from nothing else.

Assuming for the purpose of argument, the extreme contention of claimant, that the vinegar in question differs from apple cider vinegar made from fresh apples,

merely in the process of production, it remains, nevertheless, that misbranding may be predicated on this difference in view of the fact that the word "cider" upon the label connotes a distinction in process, if not in some other material particulars which appeals to and affects the ultimate purchaser's judgment of the product. Otherwise the word "cider" would not have been used.

The sugars and other soluble constituents of an apple are not the juice; the juice of an apple is the native fluid content which *carries in solution* some of the soluble constituents, and when this native juice is extracted from the apple by pressure or evaporation, what remains in the pomace of the pressed apple, or the dried residuum of the evaporated apple, is not juice; it consists of the fibrous and cellulous parts of the apple, the remaining sugars and starches and certain moisture not extracted in the native juice which has been taken away by pressure or evaporation.

*Dried apples contain moisture but not juice.* The juice has been so largely evaporated therefrom that the merest schoolboy would not be deceived into calling the remaining moisture cider or even juice. While juice may be loosely said to consist of water, *water is not juice.*

Apple pomace, the residuum from the cider press, contains juice in the same sense, although all the native juice possible has been pressed out; apple pomace contains moisture in the same manner as dried apples and a considerable quantity of sugars and other soluble constituents. If apple pomace be immersed in water these soluble constituents can be dissolved but the resultant solution will not be apple juice but water carrying in solution

these sugars and soluble constituents. The solution thus obtained from apple pomace can be fermented and made into vinegar just as readily as claimant's solution—indeed, some manufacturers of such products prefer apple pomace to dried apples for this purpose— but who would contend that a solution obtained by soaking apple pomace in water was cider, or that vinegar made therefrom was cider vinegar? Similarly the solution obtained by immersing dried apples in water may contain every chemical constituent of cider, but it is not cider. The cider, as that term has always been understood, has been removed by evaporation.

*No dehydrated, organic article can be reproduced by the factitious addition of water. It can be imitated but not reproduced. Nature's process cannot be thus easily duplicated. Man is not God; he has only been created in His image.*

It is absurd to assert that a solution obtained by soaking dried apples in water is cider. It merely resembles cider and is an imitation of it, and yet the makers of this product urge that they can change water into wine.

It must be kept in mind that it is the public which is to be protected and that it is the meaning of words as used and understood by the public, therefore, which is to be permitted on labels. The public knows the article by the common, ordinary meaning of the term used to distinguish it and must not be deceived or misled by the use of that term upon another article. This is the spirit of the law which should be enforced.

The liquid from which this vinegar was made was not, therefore, manufactured from apples and from nothing else, according to the natural and ordinary meaning of

that word, but was dried apples plus water, factitiously added to procure the solvent constituents of such dried apples.

### 3. That the government practically conceded that this liquid was apple cider.

It is not conceded that the liquid obtained from dried apples by this method is apple cider or that the vinegar obtained by this method is apple cider vinegar (Opinion p. 34). It is conceded that claimant *calls* these products respectively apple cider and apple cider vinegar (R. p. 11).

The serious contention of the government was not only that the fluid thus obtained from dried apples was not apple cider, but there was also no such concession in the agreed statement of facts, practically or otherwise.

It was apparently for the purpose of preventing any such deduction that the agreed statement (R. p. 12. Sub. 8) was made, to-wit: that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar".

The initial statement, (R. p. 10, Sub. 1) to which we have referred, is that claimant has manfactured a product from evaporated apples which *it designates* as apple cider. The statement (R. p. 12, Sub. 6) is that since 1906 claimant has sold its product *as* apple cider and apple cider vinegar, the latter to the extent now of about 100,000 barrels a year, but there is no statement as to the extent to which it has sold this solution as apple cider, and the statement, (R. p. 12, Sub. 9) that for several

years prior to the Food and Drugs Act vinegar in large quantities and *to a certain extent* a beverage made from evaporated apples, were sold in various parts of the United States *as* apple cider is equally guarded. The fact is that this solution has never been sold in any considerable quantities as apple cider, nor could it be, for its difference from the apple cider to which everyone is accustomed in flavor, odor and color is so apparent that it would not be accepted where the genuine article was known or procurable.

The guarded way in which the agreed statement treats the terminology of both the solution from dried apples used by claimant and the designation and sale of these products as apple cider and apple cider vinegar escaped the attention of the court below.

**4. That this liquid was obtained by pressure.**

The weight superimposed on top of the dried apples is obviously to keep the dried apples from rising above the top of the tank as the water is absorbed; the pressure is negligible because the water which is not confined can readily rise above the weight and would overflow the tank except for the vent at the bottom of the tank. The pressure is not dissimilar to that which occurs when a sponge is immersed in water and dried apples absorb water like a sponge.

The purpose is to dissolve in an appropriate carrier like water, the soluble constituents in the dried apples. It could be accomplished quite as completely by immersing the dried apples in water in an open vat, but that would take more room and not be so convenient or rapid.

All the pressure which takes place within the tank would similarly take place in an open vat and the solution obtained by soaking dried apples in water in an open vat could hardly be said to be derived by pressure of any kind.

It is said that water is merely a carrier in cider vinegar for the other valuable constituents and therefore that the addition of water is not material. Similarly water is only a carrier in milk. Water is merely a carrier in our bodies for the other substances which exist. It is idle to say that water is a mere carrier and thus a negligible substance which can be factitiously substituted at will.

The solution obtained by claimant could be similarly obtained if the remaining moisture in dried apples had been completely evaporated, leaving only the sugars and other soluble constituents with the fibrous and cellulous parts of the apples. The moisture remaining in these dried apples plays no part except as it may make these sugars and other soluble constituents more readily soluble.

It is true that by grinding and pressing a quantity of these dried apples a thick, viscid fluid can be obtained, but this extract from them is no more like apple juice or cider than sawdust is like wood. So can a similar exudate be obtained by crushing and pressing raisins, but the thickened exudate thus obtained is not the juice of the fruit, much less its native juice; nor would the addition of water to this extract recreate a fruit juice. It would remain water carrying in solution such of the fruit constituents as could thus be expressed and dissolved. Its nature has been changed by the process of evaporation so that it is different in character, flavor, aroma and appearance.

And that is just what the solution produced by claimant is, which it miscalls cider; it is water carrying in solution such of the soluble constituents of the dried apples as can be dissolved—not pressed—by its tank process, an effluent which no one, however unconversant with the English language would ever expect to receive when he asked for cider.

The mathematical axiom that things which are equal to the same thing are equal to each other is not applicable to foods, especially where the only method of determining differences depends upon analytical science.

The characteristics of cider vinegar include certain congeneric substances which contribute to its aroma and flavor. There are volatile ethers and esters which are driven off or diminished by the heat of evaporation and their quantity is so small that their absence or diminution cannot be detected by practicable, physical analysis any more than the odor of a rose can be so measured or weighed. Modern analytical chemistry has made immense progress from the time when it knew no elements save earth, air and water, but it is impossible by purely analytical methods to yet determine the difference between the juices of an apple and a pear, and these ethereal characteristics of cider and cider vinegar cannot yet be segregated or estimated by any known methods. Yet nothing is more certain than that they exist in cider and cider vinegar and do not in this other product.

**5. That this identical product has been accepted by the trade under this name.**

It is not conceded that this identical product has been accepted by the trade under this name (Opinion p. 34).

It is conceded that it has been so sold both by claimant and others but there is no concession that such product has ever been accepted as either genuine cider or genuine apple cider vinegar (R. p. 12).

**6. That these products are identical in taste, substance and chemical test with apple cider pressed from unevaporated apples or apple cider vinegar made therefrom.**

It is not conceded that these products are identical in taste, substance or chemical test with apple cider pressed from unevaporated apples or apple cider vinegar made therefrom (Opinion p. 34). The concession is that the liquid obtained by claimant by this method upon chemical analysis will give results *similar* to those obtained by chemical analysis of the apple cider made from unevaporated apples except the trace of barium and that the vinegar made from this liquid is *similar* in taste and composition to the vinegar made from unevaporated apples with the same exception (R. p. 12).

The opinion in the District Court states that even Judge Westenhaver noticed "slight differences in appearance and taste" between the samples of genuine cider and genuine cider vinegar and claimant's product submitted to him (R. p. 15).

Such differences are inevitable. The superior quality of cider vinegar does not depend upon its acidity but on certain ethereal substances which impart its attractive flavor and aroma. While these cannot be measured by any known method of analysis it is noticeable that they exist in genuine cider and genuine cider vinegar and do not in claimant's products. They are largely driven off by the heat used in evaporation.

**7. That the added water was substantially equivalent to what had been evaporated from the fresh apples.**

The agreed statement as to this is peculiar and unsatisfactory. It is that (R. p. 11) "Such liquid, which is substantially equivalent to that which would have been obtained had unevaporated apples been used, etc." This statement is obviously incorrect because the treatment of fresh apples in a tank in the manner stated would produce practically no result; but the deduction of the court below that (Opinion p. 30) "substantially the same amount of pure water is added to the evaporated apples that is removed by the evaporating process" is equally incorrect.

The quantity of water used by claimant is not substantially the same as that removed by evaporation. It is at least double that quantity, as plainly appears in the agreed statement of facts and in practice many times that quantity.

A quantity of such dried apples with an amount of water substantially equivalent to that removed by evaporation is put in a tank with a weight superimposed to confine the dried apples as they swell and absorb the water. A further quantity of water is then introduced in the tank through a pipe while a vent opened at the bottom of the tank allows the effluent to escape until the soluble constituents in the dried apples have been dissolved out. In practice the quantity of the effluent "useful in the manufacture of vinegar" (R. p. 11) thus obtained, is substantially equivalent to what was evaporated from the apples, but the amount of water used in this process is thus *at least double* the amount removed from the fresh apples by evaporation as shown by the agreed

statement, and in actual practice several times that quantity because the first effluent from the tank is too poor in vinegar constituents to be "useful in the manufacture of vinegar" (R. p. 11), and is allowed to run away until it becomes rich enough to be useful.

## VII.

### The Assumptions of the Court Below Dehors the Agreed Statement Believed to Be Erroneous.

### 1. That sun-dried apples contain less moisture than the dried apples used by claimant.

The court assumed that the sun drying of apples produced a hard dried fruit containing less moisture than the dried apples used by claimant. This is not true as will readily appear upon examination of samples of such dried apples. In truth, the sun-drying of apples removes somewhat less of the liquid contents thereof than does the commercial evaporation of apples so that they contain more moisture than do the dried apples used by claimant.

Fresh apples consist of 88 to 90 per cent of water and if 80 per cent of this water be removed by evaporation, as stated in the agreed statement of facts, it is plain that the dried apples used by claimant have been reduced, as is indeed the truth, to much greater dryness than sun-dried apples.

Claimant would lead the court to believe that the dried apples used by claimant conformed to the definition of evaporated apples in Circular 136 of the Department of Agriculture and consisted of peeled, cored, sliced apples,

but such is not the fact nor does the agreed statement contain any such claim. The dried apples referred to in the agreed statement are whole, unpared, uncored apples chopped into convenient sizes and evaporated, known commercially as "chops". Commercial plants engaged in evaporating apples take the orchard run of all sizes, pare, core and slice the larger sizes for commercial evaporated apples, such as are described in Circular 136, and chop and evaporate the smaller sizes not available for commercial evaporated apples and dispose of them as "chops". This is what the agreed statement of facts means (R. P. 11 Sub. 2.) when it says that claimant uses "during the balance of the year evaporated apples of like quality, including as large a portion thereof as it can manufacture in its own plants." Translated into practice, this means that claimant produces in its own evaporating plants a small quantity of "chops" and buys a far greater quantity from commercial evaporating plants.

**2. That the fresh apple season is too short for economical utilization of the apple crop.**

The opinion states contrary to the fact that it is perfectly apparent that the apple season is altogether too short for the economical manufacture of the crop during the season into cider vinegar in sufficient quantities for public consumption (R. p. 32). There is no foundation for this statement. While the manufacture of cider is a seasonable business, there is ample time during the three months in the fall when the fresh apple crop is available to produce all the *cider* necessary for the manufacture of genuine cider vinegar which is a later and longer process

After the apple pressing season is over, the cider is fermented and manufactured into vinegar during the six or eight months following, so that while the cider is produced in the fall when fresh apples are available the alcoholic and acetous fermentations of the cider progress through the following winter and spring and into the following summer. Indeed there are manufacturers who adopt the practice of storing the cider to obtain, as they believe, a superior hard cider for the acetic fermentation into vinegar. In years when there is a large apple crop, surpluses of vinegar thus produced are carried forward in large quantities into succeeding years when a smaller crop makes the supply of fresh apples insufficient. But the well known excellence of cider vinegar and the higher cost of its production has led to every kind of imitation of it, by the use of colored distilled vinegar, molasses vinegar, corn syrup vinegar and many others and in recent years the production of an alleged cider vinegar from dried apples, dried apple skins and cores, and dried pomace, the aggregate of which deception has become so enormous as to seriously impair the market for cider vinegar.

This is not a mere trade controversy. It is a contest for honest labels and fair competition in the interest of the public for whose protection this act was passed. It is primarily for the purpose of enabling the public to know what it is buying, getting what it buys, and receiving sufficient information from the label to make an intelligent selection. If claimant's product be equal or superior to cider vinegar, claimant has nothing to fear and the public should have the information. If it be inferior, the public is likewise entitled to have the information.

Neither is it an effort to drive this product out of the market. It is an effort to compel it to sail under its own flag and win what recognition it receives on its own merits. It has too long hidden itself in the shadow of cider vinegar and should get out in the open and cast its own shadow by which the length of its days may be determined.

Nor is it an effort to drive this particular manufacturer out of business. We are opposed to the manufacture and sale of this product as cider vinegar by anyone and everyone engaged in this practice, which we believe to be unlawful and dishonest, and insist that they make and sell their product for what it is and on its own merits.

Similarly, alum baking powder formerly skulked in the shadow of cream of tartar baking powder until forced by the law to get out in the sun and cast its own shadow. To-day, it sells for what it is in open competition with other kinds of baking powder and the public with information as to what it is, makes a discriminating and intelligent choice, no longer deceived by its illegal and dishonest label.

**3. That vinegar made from concentrated cider with added water could legally be called cider vinegar.**

The opinion states that it would hardly be contended that vinegar made from evaporated cider to which water had been added would not be apple cider vinegar. It is seriously contended that it would not. A large article of commerce is concentrated or boiled cider reduced by heat from five volumes to one and manufacturers frequently

dilute this concentrated or boiled cider with water and make vinegar therefrom but the branding or sale of such vinegar as cider vinegar has always been condemned both by the Government and state authorities and many successful prosecutions of such a product have made.

**4. That decayed apples are used in the manufacture of genuine cider vinegar as stated in the Standard Encyclopedia.**

Neither is the quotation in the opinion from the Standard Encyclopedia with reference to the manufacture of cider from decayed fruit in accord with the facts nor with the other literature on the subject. It is recognized throughout the industry that decayed fruit is a detriment in the manufacture of cider and cider vinegar and there is nowhere in the United States that such material is used by reputable manufacturers. Indeed, manufacturers often buy whole orchards in their effort to obtain the best grade of fruit obtainable although the price of the grades fit for barrelling usually prohibits their use for cider and cider vinegar, but sound, ripe, mature apples, free from rot or ferment, are demanded and used for the manufacture of genuine cider and genuine cider vinegar, and immature, decayed or fermented apples are rejected. In their effort to improve the quality of their cider and cider vinegar, many manufacturers beside thus selecting them, wash all apples before pressing, and this is required by the laws of some of our states, such as Michigan. If any manufacturers use such material as is described in the Standard Encyclopedia, they do not produce genuine cider or genuine cider vinegar.

**5. That water in large proportions is added to apple pomace in the production of genuine cider vingar.**

The agreed statement of facts does not include any suggestion nor is there any foundation for the statement that cider manufacturers add 50 per cent or any other quantity of water to apple pomace in order to submit the apple pomace to a second pressing, and add the liquid thus obtained to the cider produced from first pressing, and so far as this suggestion may have influenced the court, the statement is not only outside the record but entirely untrue.

**6. That claimant's product has been unchallenged for many years.**

It is not conceded that the sale of claimant's product for many years has been without challenge.

The very Government circulars referred to in the agreed statement of facts, such as Food Inspection Decision 140, which was issued in 1912, as the result of a general hearing of all vinegar manufacturers, held in Washington in August, 1911, by Secretary Wilson, then Secretary of Agriculture, distinctly declares that vinegar made from dried apples shall not be entitled *even to be called vinegar* without further designation to show the material from which it is produced, and scores of successful prosecutions of other manufacturers of misbranded cider vinegar made from dried apples have been instituted by Federal and state governments since the enactment of the Food and Drugs Act, which has been copied into the statutes of many states. *The claimant here is the only manufacturer in the country who has resisted this ruling.*

Nor is the fact that claimant has been engaged in manufacturing such products and selling them as apple cider and apple cider vinegar for many years relevant to the question at bar, nor is the claimant entitled to any consideration by reason thereof.

The same claim to impairment of vested rights was made in People v. Girard, 145 N. Y., 105, 109, where Judge Finch disposed of it tersely as follows:

> "There is talk of interference with the vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public."

**7. That the Act only provides against deception "to the prejudice or harm" of the purchaser.**

The opinion suggests that the purpose of the statute is to protect the purchaser from being misled to his "prejudice or harm", but this is not the language of the statute, which declares that a package shall be deemed misbranded if it or its label shall bear any statement, design, or device, regarding such article or the ingredients or substances contained therein, which shall be *false or misleading in any particular.*

## VIII.

### Important Parts of the Agreed Statement to Which the Court Below Failed to Give Due Weight.

**1. The vinegar in question is a by-product in the manufacture of pectin by claimant.**

The court below overlooked the significance of the statement that from the pulp of the dried apples after the production of the liquid therefrom in the manner described, the claimant manufactures a product called "pectin." (R. .p 11)

Pectin is the property of an apple which causes fruit juice to coagulate into jelly. It is associated with the cellulous parts of the apple and the principal business of the claimant is the manufacture and sale of this pectin under the name "Certo" and otherwise which it thus derives as stated from the residuum left in the tank after the soluble constituents have been dissolved therefrom with water. The solution thus obtained is therefore a by-product in the process of manufacturing pectin and, if it were not economic waste, claimant could throw this solution away and still derive profit from its pectin, but it naturally seeks, since it is convertible into vinegar, to derive an additional profit from this by-product and, since it can obtain a better price by selling it as cider vinegar, seeks the benefit of this label and this market.

Others are now engaged in the manufacture of pectin and vinegar from dried chops, dried apple skins and cores, and dried apple pomace. If this vinegar by-product can be sold under a label which will disguise its character, many others will engage in it. Those able to employ the most skillful chemists and processes will naturally be most successful. The cheaper product will

drive the genuine and more expensive product from the market and the production of pure cider vinegar made exclusively from the native juice of fresh apples, as is done by those we represent, may cease and genuine cider vinegar cease to be an available article of consumption in this country.

Already, a public patent has been issued for a synthetic apple syrup (No. 1,436,290. Dated November 21, 1922. Synthetic Apple Oil.) We quote from this patent:

> "We have found that the odorous constituents of the apple include, in addition to the combination of substances described in Patent No. 1,366,541, issued to us under date of January 25, 1921, which substances are the amyl esters of formic, acetic, caproic and caprylic acids, together with acetaldehyde; also a very small amount of the aliphatic terpene alcohol known as geraniol. $C^{10}H^{18}O$. This substance may be considered to exist both in the free state and in the form of its esters, and it imparts to the apple a distinctive fragrance. Although contained in very small proportion in the most fragrant varieties of the fruit, it is believed to be a constituent of all apples.
>
> "Geraniol or its esters has been found to modify to a considerable degree the odor of our synthetic apple oil and to materially enhance its fragrance, thus enabling us to reproduce more truly and completely the natural odor of the choicest apples.
>
> "We claim:
>
> "1. A synthetic apple oil consisting of the amyl esters of formic, acetic, caproic and caprylic acids, acetaldehyde, geraniol, geranyl formate and geranyl acetate."

How long will it be before synthetic cider vinegar, which may not contain anything derived from an apple, will be produced by ingenious inventors and yet, because

it may be indistinguishable by any of the available means of science, will be foisted upon an unsuspecting public, who, finding that it resembles cider vinegar and will perform the offices of cider vinegar, will accept it in blissful ignorance that it is not the article known to them and their ancestors for generations as cider vinegar?

It is undoubtedly true, as stated in the opinion, that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such, but the misuse of the term cider in the claims made in the Allen patent referred to in the opinion in the court below (Opinion, p. 32) is irrelevant. What the patentee meant was that he preserved the cider flavor without the accompaniment of the useless water. Cider evaporated to dryness could not be still called cider by any stretch of the imagination.

**2. Analogous applications of the decision of the court below.**

Evaporated whole milk is on the market and powdered whole milk is on the market. How long will it be before butter is produced from either of these by restoring the water evaporated therefrom and with what confidence will the manufacturers of that product rely upon the decision made in this case, if it be affirmed, as establishing their right to market the same as butter without any indication that it is an imitation of the genuine article, since nothing has been used in its manufacture save what is derived from milk or cream with the evaporated water factitiously added thereto?

Dried, soaked peas have been upon the market for years. They are nowhere permitted to be sold without descriptive words to indicate that they have been through

the evaporation process, although, if the water be restored they are substantially identical with the canned green peas of commerce.

What limits can be set to the application of the principle that by the factitious addition of water to dried fruit products a liquid equivalent to the native juice can be produced? The products therefrom should not be allowed to masquerade as native juice products without distinction as to label, and how can it be said that the public is not entitled to this information because the distinction is a mere matter of process in production.

### 3. Ohio and other state statutes.

The court may also have overlooked the statutory definition of cider vinegar in Section 5787 of the Ohio law wherein it is defined to be the "product made by the alcoholic and subsequent acetous fermentations of the juice of apples," but this provision as well as the provision from the preceding section 5686 of that law requiring all vinegar to be made *wholly* from the fruit or grain from which it purports or is represented to be made, seems plainly to exclude the factitious addition of water in the manufacture of cider vinegar.

The statutes of many other states either expressly or by plain implication forbid the labelling of claimant's product as cider vinegar. A few examples will suffice:

Massachusetts. "Whoever labels, brands or sells as cider vinegar or as apple vinegar any vinegar not the exclusive product of alcoholic and subsequent acetous fermentation of the pure juice of fresh apples shall be punished by a fine of not more than $100." (General Laws chap. 94, sec. 171).

Maine. "The term cider vinegar, apple vinegar shall be construed to mean the product made exclusively from the expressed juice of clean, whole apples by alcoholic and subsequent acetous fermentation, the acids, solids and ash of which have been derived exclusively from the apples from which it was fermented." (Chap. 172, Laws 1923, sec. 2).

"For the purpose of this act vinegar shall be deemed to be adulterated if a product made from dried apples or from apple skins, apple cores and chops by the process of grinding and soaking with subsequent alcoholic and acetous fermentation of the solution thus obtained, is not plainly marked to show the material from which it is produced." (Chap. 171, Laws 1923, sec. 4).

Alabama. "The terms cider vinegar and apple cider or words of similar import shall be construed to mean the product made exclusively from the expressed juice of apples by alcoholic and subsequent acetous fermentations."

"The term evaporated apple products vinegar or vinegar made from evaporated apple products or words of similar import shall be construed to mean the product made by the alcoholic and subsequent acetous fermentations of the aqueous substance obtained from clean, sound, unfermented, dried, chopped apples or dried apple skins or cores." (Agricultural Code, Art. 9, sec. 1).

Missouri. Any person who "offers or exposes for sale as cider vinegar any vinegar not the legitimate product of pure juice known as apple cider or vinegar not made exclusively of said apple cider or vinegar into which foreign substances, drugs or acids have been introduced, as may appear on proper tests, shall be deemed guilty of a misdemeanor." (R. S. 1909, sec. 4841).

Pennsylvania. "No vinegar shall be sold or exposed for sale as apple or cider vinegar which is not the legitimate product of pure apple juice or vinegar not made exclusively of said apple cider or vinegar in which foreign substances, drugs or acids shall have been introduced as may appear upon proper test." (Act of June 18, 1897).

Under this statute the reduction of pure cider vinegar with water was held to be an adulteration.

*Comm. vs. Burtnett,* 58 P. Sup'r Ct. 604.

Subsequent to such decision the Act was amended by providing "that apple or cider vinegar may be sold which has been reduced to a strength of not less than 4 percentum by weight of acetic acid by the addition of pure water if the cask, barrel, keg or package containing such vinegar shall be plainly or distinctly marked or branded to conform to the actual contents thereof." (Act of July 11, 1917).

## IX.

### Importance of the Question Involved Not Clearly Apparent from the Agreed Statement.

The agreed statement of facts gives little indication of the importance of this question to the growers and producers of fresh apples and the manufacturers of cider and cider vinegar from the native juice of them.

Apple skins and cores as a by-product of evaporating plants are produced in immense quantities and run through their evaporators in a sulphur dioxide vapor bath in the same manner as they treat chopped, small

apples for the purpose of disposing of this by-product of the evaporator at a profit. Claimant is one of the large buyers of these dried apple skins and cores as well as of dried chops.

These dried apple skins and cores are as rich in sugars and soluble constituents as are the dried, chopped apples, and the solution obtained by soaking them in water is as rich in sugar constituents and as readily fermentable into vinegar, and the finished vinegar, whether made from dried chopped apples or dried skins and cores is indistinguishable. The residuum therefrom in the tank is as available for the manufacture of pectin, as the residuum described in the agreed statement, and the decision of the court below is relied upon and has been announced by claimant as a vindication of its right to market its vinegar made both from dried chops and dried skins and cores as apple cider vinegar. Other manufacturers of this product have either refrained from this attempt or suffered prosecution therefor and paid their fines or permitted condemnation of their goods. *This claimant is the only producer of such vinegar in this country who has attempted to justify such practices.*

If the decision made by the court below be allowed to stand and claimant be not restrained from this unfair and deceptive practice others who manufacture pectin and its by-product, vinegar made from dried, chopped apples, dried apple skins and cores and dried apple pomace, will, relying upon the decision of this court, adopt the same practice, and the flood of imitation cider vinegar thus placed upon the market, cheaper and easier to manufacture, will drive the older and better and more expensive article from the market, and thus ruin the

business of those who are endeavoring to produce genuine cider vinegar from the native juice of fresh apples, and destroy the apple growers market for cider apples.

The importance of the question upon this aspect is undeniable and incalculable and it is because this decision will be fraught with such consequences that consideration of it by this court has been sought, and the opportunity prayed to more fully and carefully lay before this court the facts and the arguments, than was afforded on the hearing of the appeal in the court below.

## X.

## The Decision in Favor of Claimant in the New York Court of Appeals.

People vs. Douglas Packing Co., 236 N. Y. 1, 139 N. E. 759 was an action for a penalty brought in the New York Supreme Court by the people against claimant for selling a similar product, similarly branded, under the statute of New York, providing that the term cider vinegar and apple vinegar should be construed to mean the product made exclusively from the pressed juice of apples by alcoholic and subsequent acetous fermentations, the acidity, solids and ash of which had been derived exclusively from the apples from which it was fermented.

In the trial court the people rested their case upon the concession by defendant that the vinegar in question was made from evaporated unpared apples designated as "chops" and offered no further evidence. Defendant then offered evidence to show its practice and products in detail. At the conclusion of the trial a verdict was directed against defendant by the trial judge, the judg-

ment was affirmed by the Appellate Division of the court, one justice dissenting, and reversed by the Court of Appeals, one judge dissenting. Thus in all the courts six judges held against defendant and seven in its favor.

The question of vinegar made from dried apples had once before been before the same court and the vinegar held misbranded as cider vinegar (People vs. Niagara Fruit Company, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629) but that decision was distinguished by the fact that coloring had been added to the vinegar made from dried apples in the earlier case, although barium carbonate had been used for the same purpose, viz: imitation, in the later case.

After the cause was argued in the Court of Appeals and while it was under consideration, the decision of the Sixth Circuit Court in the case at bar was announced and immediately transmitted by claimant's counsel to the New York Court of Appeals. It undoubtedly had much weight because the opinion in the New York Court of Appeals follows the decision thus rendered in the Sixth Circuit.

The New York Court of Appeals held in substance that it could not be presumed that the legislature intended to limit the labels in question to the juice of fresh apples or it would have said so. This conclusion is opposed to the uniform trend of prior misbranding decisions in that and other courts, to the common understanding of the people as to the meaning of the language used by the legislature and it is submitted was erroneous although the legislature of that state alone can correct the error.

## XI.

### Conclusion.

For all these reasons it is most earnestly urged that the decision of the court below should be reversed and the judgment of the District Court affirmed in order that the large interests engaged in the production of apples and in the manufacture of genuine cider vinegar may not have their business impaired and genuine cider vinegar not pass into history as a product which has been superseded by a cheaper imitation of it, upon whose merits the public have been unable to pass, through a deceptive label which did not reveal sufficient information for the public's intelligent judgment.

Rochester, N. Y., March 10, 1924.

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